

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION SIX**

**MERCK, SHARP & DOHME CORP.**

**and**

**UNITED STEEL, PAPER AND FORESTRY,  
RUBBER, MANUFACTURING, ENERGY,  
ALLIED INDUSTRIAL AND SERVICE  
WORKERS INTERNATIONAL  
UNION, LOCAL 10-580, AFL-CIO, CLC**

**Case 06-CA-163815**

**LOCAL 94C, INTERNATIONAL CHEMICAL  
WORKERS COUNCIL OF THE UNITED FOOD  
AND COMMERCIAL WORKERS  
INTERNATIONAL UNION, AFL-CIO**

**Case 05-CA-168541**

**UNITED STEEL, PAPER AND FORESTRY,  
RUBBER, MANUFACTURING, ENERGY,  
ALLIED INDUSTRIAL AND SERVICE WORKERS  
INTERNATIONAL UNION, LOCAL 4-575, AFL-CIO, CLC**

**Case 22-CA-168483**

**ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

**Submitted by:  
David L. Shepley  
Counsel for the General Counsel  
National Labor Relations Board  
Region Six  
William S. Moorhead Federal Building  
1000 Liberty Avenue, Room 904  
Pittsburgh, Pennsylvania 15222**

**Dated at Pittsburgh, Pennsylvania,**

**This 31<sup>th</sup> day of March, 2017**

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**I. PRELIMINARY STATEMENT**

Upon a charge and amended charges duly filed with Region Six of the National Labor Relations Board (herein called the "Board") by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 10-580, AFL-CIO, CLC, (herein called "Local 10-580"), a charge and amended charges duly filed with Region Five of the Board by Local 94C, International Chemical Workers Council of the United Food and Commercial Workers International Union, AFL-CIO, (herein called "Local 94C"), and a charge

and amended charges duly filed with Region 22 of the Board by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 4-575, AFL-CIO, CLC, (herein called "Local 4-574"), a Consolidated Complaint and Notice of Hearing issued on June 30, 2016, against Merck, Sharp & Dohme Corp. (herein called "Merck" or "Respondent"). [GCX-1(u)]<sup>1</sup>

The Consolidated Complaint alleges that Respondent violated Section 8(a)(3) of the National Labor Relations Act (herein called "the Act") by unlawfully failing to give employees represented by the Charging Parties September 4, 2015, as a paid day off work, while granting its unrepresented employees the same benefit. The Consolidated Complaint also alleges that Respondent violated Section 8(a)(1) of the Act by its supervisor and agent, Brian Killen, unlawfully informing Respondent's employees that Merck's denial of a paid "Appreciation Day" was in retaliation for labor problems.

The hearing in this matter was held before Administrative Law Judge David Goldman (herein called "the ALJ") in Bloomsburg, Pennsylvania on October 4 and 5, 2016. The ALJ issued his Decision and Recommended Order on December 20, 2016 (herein called the "ALJ's Decision"). In his Decision the ALJ found that Merck had violated Section 8(a)(3) of the Act by "discriminatorily denying union-represented employees a paid day off in retaliation for union activity protected by the Act." The ALJ also found a Section 8(a)(1) violation through Merck's supervisor informing employees that the aforesaid unlawful conduct of Respondent was in retaliation for union activity protected by the Act.

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<sup>1</sup> "GCX" designates Counsel for the General Counsel's exhibits; "JX" designates joint exhibits. Numbers in brackets (in small font) designate page and line numbers in the official transcript "RB" designates Respondent's Brief in Support of Exceptions; "ALJD" designates the Decision and Recommended Order of Administrative Judge David Goldman. "RB" designates Respondent's Brief in Support of Exceptions; "ALJD" designates the Decision and Recommended Order of Administrative Judge David Goldman.

Respondent timely filed Exceptions to the ALJ's Decision and a brief in support thereof on February 17, 2017. After an extension of time was granted to March 31, 2017, this Answering Brief is filed in response thereto.

Concurrent with the filing of Exceptions by Respondent, a Motion to Reopen the Record to Adduce Additional Evidence Relevant to Respondent's Due Process Claim was filed. On March 1, 2017, Counsel for the General Counsel filed an opposition to the aforesaid motion to reopen the record.

## **II. STATEMENT OF FACTS**

Sometime during the spring of 2015, the chief human resource manager for Merck initiated discussions of how Merck could show corporate appreciation for its employees at a time when Merck was experiencing strong business success. [144] Jeff Geller ("Geller"), Vice President of Global Compensation and Benefits, subsequently spoke with several managers in the human resources area about what form the appreciation should take. A consensus was reached that granting employees a paid day off was the best way to show appreciation. According to Geller, "providing a day off would be the right signal to our employees." [144/24-25]

In July 2015, a tentative date for Appreciation Day was selected by Geller and his recommendation was sent to his superiors. The date selected was September 4, 2016, the Friday before Labor Day in the United States. CEO Kenneth Frazier ("CEO Frazier") approved the plans for an Appreciation Day on the date selected.<sup>2</sup> [149/2; 155/24; 156/3]

As part of its decision to make September 4 an Appreciation Day, Merck decided to exclude its employees who were covered by a collective bargaining agreement from receiving the benefit (hereinafter this decision is referred to as "Merck's decision to exclude").<sup>3</sup> According to Geller,

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<sup>2</sup> All dates herein are for 2016 unless otherwise stated.

<sup>3</sup> Although the label I have given for Respondent's unlawful conduct for simplicity sake refers to a "decision", the actual unlawful conduct, as described in paragraphs 8 and 9 of the Consolidated Complaint, was Merck's failure to actually give September 4 as a paid day off to the employees represented by the Charging Parties herein and certain other employees covered by collective bargaining agreements in the United States.

Merck's decision to exclude was made with input from Tony Zingales ("Zingales"), Merck's then Director of Labor Relations. [153/14-154/4] Zingales gave Geller the basic legal advice that it would be unlawful for Merck to unilaterally give Appreciation Day to employees covered by a collective bargaining agreement. [153; 195/11-15] Zingales was not privy to the fact that Merck was not going to offer Appreciation Day to employees in the United States who were covered by a collective bargaining agreement, a fact he admitted to Local 4-575 President James Conway ("Conway"). [132/11-17]

On July 28, 2015, CEO Frazier announced in writing to Merck employees worldwide that they would be given an Appreciation Day on September 4. However, the notice stated that Appreciation Day was not to be given to employees covered by a collective bargaining agreement. The excluded employees would include those represented by the Charging Parties in the instant cases. [JX-1; JX-4] The announcement gave no explanation whatsoever for Merck's decision to exclude.

The announcement of the terms of the Appreciation Day immediately created a firestorm of criticism from unionized employees and the local officers. [67/4-16] Employees excluded from receiving the benefit could not understand why they were being excluded from a show of appreciation inasmuch as they believed they too had helped Merck achieve the financial success that gave rise to Appreciation Day. [24/24-25] As a result, they voiced extreme displeasure to their local officers.

Employees also posted numerous negative messages on the blog section of Merck's intranet website. Elisabeth D. Goggin ("Goggin"), Merck's Head of Global Relations, posted a response to these negative messages stating, in part, that changes in benefits cannot unilaterally be granted. In her posting she did not acknowledge that the parties to the various collective bargaining agreements in effect could mutually agree on changes to terms and conditions of employment such as Appreciation Day. [JX-5]

Daniel Bangert (“Bangert”), President of USW Local 10-00086 (“Local 10-00086”) at Merck’s West Point, PA Plant, strongly protested Merck’s decision to exclude in an open letter to Merck. [JX-2] CEO Frazier replied to Bangert’s letter stating, in part, “there are constraints on implementing unilateral changes—for better or worse—for employees covered by a collective bargaining agreement.” As with Goggin’s posting, CEO Frazier failed to mention that the parties to the collective bargaining agreements could mutually agree to changes in the terms and conditions of employment. [JX-3]

About July 30, 2016, Edward Vallo (“Vallo”), President of Local 10-580, forwarded Bangert’s letter of protest to Brian Killen (“Killen”), the then Riverside Plant Manager. Killen was away from the plant on vacation at the time. Killen notified Vallo that they could discuss the matter when he returned to work on Monday, August 3. [242/15] Prior to his return to the plant, Killen also arranged with his superiors to hold an unprecedented conference call with Zingales, human resources persons and other affected plant managers to address the reactions of the locals and the employees to the announcement of Appreciation Day. [270/8-21]

On August 3, Killen initiated a brief conversation with Vallo in which Killen said he had no details on the matter of Appreciation Day, but he would immediately look into it and get back with Vallo. Sometime later in the day on August 3, Killen participated in the conference call he had arranged with Zingales and several plant managers whose employees were directly impacted by Merck’s decision to exclude. [269/14-18] Merck’s decision to exclude was discussed during this call, including the legal aspects. [243/12-21] Killen asked Zingales about the company’s intent with respect to possible negotiations with the unions over their unit employees receiving Appreciation Day. Zingales told the plant managers that Merck had no intention to negotiate in this regard. [244/2-3] When Killen pressed Zingales for a reason for Merck’s decision to exclude, according to Killen, Zingales stated it was because in the last couple years there were instances where the

unions were unwilling to participate in mid-contract negotiations over certain changes which Merck sought to the relevant collective bargaining agreements. [244/2-15]

On August 4, Killen asked Vallo to meet with him to report what Killen had learned about Merck's decision to exclude. [52/22] Killen met with Vallo and Scott Little ("Little"), Chief Steward for Local 10-580, on August 4. At this meeting, Killen expressed to Vallo and Little his profound dissatisfaction with Merck's decision to exclude. Vallo asked why Merck did not contact the unions to discuss the matter. Killen replied that it was his understanding that Merck had no intention to do so. [245/13-16] Then Vallo asked Killen the question he was hearing from his members-- why would Merck decide to exclude the unionized employees from receiving Appreciation Day? [30/3] According to the relevant testimony credited by the ALJ, Killen told the Local 10-580 officials that the reason for Merck's decision to exclude was "linked" to payroll administration, 401K administration and year-end holiday changes that Merck had proposed to the unions in the past and which the unions had refused to discuss outside of negotiations. [245/17-23] Killen ended this meeting by telling Vallo that he would get back to him to continue their dialogue on the matter because Killen wanted to make things right at the Riverside Plant. [30/17-23]

A day or two later Killen went to speak with Vallo in the union office at the plant. [31/2-5] This meeting turned out to be the first of several that were held over the following weeks where Killen and Vallo exchanged ideas regarding what benefit Killen, with the concurrence of Local 10-580, could give the Riverside Plant employees to somehow make up for their having been excluded from receiving Appreciation Day. At no time during this series of discussions was the possibility of Local 10-580 members receiving Appreciation Day raised by Killen.<sup>4</sup>

One of the other local officials with whom Vallo spoke about Merck's decision to exclude was Conway. [139/20; 198/3-199/10] When Conway registered his complaint to Zingales shortly after the July 28 announcement was made, Zingales admitted he had not been personally informed by

Merck management that the company was not going to offer Appreciation Day to employees in the United States covered by collective bargaining agreements. [132/11-17]

Vallo, Conway, Bangert and three other local union presidents affected by Merck's decision to exclude sent a letter to CEO Frazier on about August 21, 2016, [JX-6] In that letter, the local presidents pointed out that in the past Merck had asked unions that represented its employees if they wanted to receive benefits that Merck was giving company-wide. [JX-6, paragraph 3] They specifically requested that the employees they represented receive September 4 as a paid day off work just as unrepresented employees were to receive. [JX-6, paragraph 4] The letter concluded with a promise by all the locals to not file grievances or Board charges if Merck allowed their represented employees to be included in the upcoming Appreciation Day. [JX-6, last paragraph] Merck admits it did not respond to the earnest plea of the signatories to the August 21 letter. [191/11]

On August 21, Killen informed Vallo that he had been told by higher management that Merck would not bargain with Local 10-580 over the exclusion of unit employees from receiving Appreciation Day. [254/12-16] September 4 came and went with employees covered by a collective bargaining agreement being the only Merck employees in the United States who did not receive the day off with pay.<sup>5</sup>

Merck has at various times in the past concurrently given certain benefits to both its unrepresented and represented employees. In 1990, Merck gave all employees a stock option for 100 shares, and, in 1991, Merck gave all of its employees another 100 share stock option.

[35/3-8 and 36/8-16, respectively] Merck gave all employees January 2, 1998, off with pay. [37/3-7]

Merck designated January 2, 2009, a Friday after the New Year's Day holiday, as a "Company

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<sup>4</sup> The various proposals Killen and Vallo discussed are irrelevant to Merck's decision to exclude. Accordingly, the content of those several discussions will not be recounted herein.

<sup>5</sup> The sole exception was the unionized employees at Merck's Kenilworth Plant where the collective bargaining agreement in place required that they receive all benefits Merck might give to unrepresented employees. [179/15-18] This required action by Merck is irrelevant to judging its conduct with respect to the employees covered by other collective bargaining agreements, including those employees represented by the Charging Parties.

Holiday” and entered into an agreement with Local 4-575 covering the terms for the provision of that benefit. [RX-6]

Represented employees received a holiday in 2006 through an interaction with management that showed Merck was willing to give a benefit to represented employees that had not been bargained for. Negotiations for a collective bargaining agreement did not result in employees represented by Local 10-580 receiving a Martin Luther King Day holiday. However, unrepresented employees had already been given the holiday. Merck’s then Director of Labor Relations, Glen Guior, shortly after the new contract was in place, implored Vallo to make an official request that represented employees under the umbrella of a Merck Inter-union Council be given Martin Luther King Day as a paid holiday. Vallo made the request and it was immediately approved. [37/15- 38/15]

### **III. ARGUMENT AND AUTHORITIES**

#### **A. Overview of Respondent’s Exceptions**

Counsel for the General Counsel does not concede or agree to the validity or applicability of any of the statements or arguments made by Respondent in its Exceptions and brief in support thereof, including those which are not specifically referred to herein. In the instant case, the clear preponderance of the evidence rests with the findings made by the ALJ in his Decision and not with any findings to the contrary proposed by Respondent in its Exceptions. In further response to Respondent’s Exceptions, Counsel for the General Counsel submits that Respondent’s arguments are erroneous and misplaced. It is submitted that the well-reasoned Decision of the ALJ fully supports all of his conclusions of law which are adverse to Respondent. Turning to the actual exceptions, Respondent has filed three exceptions to the factual findings of the ALJ and six exceptions to his legal conclusions. One of the latter

exceptions is to the remedy set forth in the ALJ's Decision. Each of these exceptions will be addressed below.<sup>6</sup>

**B. Exception (#1) to the ALJ's factual finding "that the Company did not grant the September 4 day off to 'union-represented employees'"**

Respondent objects to the ALJ's use of the term "union-represented employees to refer to the employees of Merck who were directly affected by its decision to exclude. It would seem to the Counsel for the General Counsel that perhaps a response to this exception is barely required, but to the extent one is helpful to the Board, Counsel for the General Counsel points out that Merck granted the Appreciation Day benefit to "those in the U. S. who are covered by a collective bargaining agreement." [JX-1] All of these affected employees are represented by the Charging Parties or other unions. In short, the ALJ's occasional use of the term "union-represented employees" is factually accurate and it in no way detracts from his legal conclusion that Respondent violated Section 8(a)(3) of the Act by its conduct with respect to Appreciation Day. To suggest otherwise is patently wrong. Accordingly, Respondent's exception in this regard should be denied.

**C. Exception (#2) to the ALJ's factual finding that "Mr. Zingales' legally accurate understanding that Merck could not 'unilaterally grant' the September 4 paid holiday was not part of the Company's decision-making process"**

The ALJ found that Zingales told Geller that it would be illegal for Merck to unilaterally grant Appreciation Day to employees represented by a union. Indeed, if Zingales had failed to convey this fundamental legal fact to higher management it would be both shocking and an act of gross incompetence for a person in his position. However, the ALJ found that this particular legal advice was not the driving force for Merck's decision to exclude. Rather, the ALJ drew a reasonable inference from the testimony of Geller and Zingales, along with certain other facts, as to the real motivation for Merck's decision to exclude. These other facts include Merck's

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<sup>6</sup> The portion of Respondent's brief in support of exceptions where it argues that it was denied due process by the ALJ [RB 40-46], will not be addressed herein because it has already been addressed through Counsel for the General Counsel's Opposition to Respondent's Motion to Reopen the Record to Adduce Additional Evidence Relevant to Respondent's Due Process Claim, filed March 1, 2017.

stated openness to possibly granting Appreciation Day to its union-represented employees outside the United States and Merck's past practice of offering days off with pay to its represented employees in the United States. Moreover, the ALJ understood that neither Geller, Zingales, nor any other witness specifically testified that because Appreciation Day could not be unilaterally granted, Merck management therefore concluded it could not offer Appreciation Day to employees covered by a collective bargaining agreement in the United States.

Although the ALJ did not specifically note in his decision that Conway testified that Zingales told him that he did not know beforehand of Merck's decision to exclude, it is highly significant that the ALJ did not discredit Conway's testimony on this or any other point. [132/11-17] Zingales, in his detailed testimony regarding his phone conversation with Conway, did not deny that he told Conway he was ignorant of what Merck was going to do. [198/3-199/10] Moreover, Respondent's counsel did not elicit testimony from Zingales as to what he told, or did not tell, Conway about his knowledge of the decision to exclude. Thus, the testimony regarding Zingales' admission to Conway further supports the ALJ's finding that Merck's decision to exclude was not the result of Merck's obvious awareness that it would have been unlawful to unilaterally grant the day off with pay to employees covered by a collective bargaining agreement.

For all the foregoing reasons, Respondent's exception in this regard should be denied.

**D. Exception (#3) to the ALJ's factual finding that Zingales did not have a collective bargaining strategy to avoid entertaining negotiations for additional benefits during the terms of the Company's multiple collective bargaining agreements and bargaining with the unions as a group**

The ALJ acknowledged that Zingales claimed to adhere to a strategy of avoiding negotiations that might result in giving additional benefits during the terms of a collective bargaining agreement. [ALJD 15/30-32; 37-40] The ALJ also noted that Zingales implemented a bargaining strategy where bargaining was to be done with individual unions rather than

collectively. [ALJD 15/33-37; 42-44] However, even if Zingales truthfully testified that he thought it was not “a good bargaining strategy to give away a holiday”, his preference in this regard does not detract from the ALJ’s finding that Merck’s decision to exclude was not the result of any such bargaining strategy Zingales favored. This finding is starkly revealed by certain testimony of Zingales which was elicited on direct examination by Respondent’s counsel. That stunning testimony is as follows:

Respondent’s Counsel: Did you share that view [the aforesaid purported bargaining strategy about giving away benefits] with Mr. Geller and others in the management of the company when as you were consulted about this appreciation day?

Zingales: I didn’t discuss that with Jeff [Geller] as I recall. [178/14-17]

Zingales failed to tell Geller what he supposedly believed despite Geller’s seeking his counsel regarding exactly how Merck could implement Appreciation Day. Based on the aforesaid revelation, the ALJ relied upon the salient fact that Zingales simply did not tell Geller anything about this purported bargaining strategy. [ALJD 3/34-36] Thus, the ALJ gave no weight in his legal analysis to whatever unspoken bargaining strategy Zingales preferred.

Respondent’s exception does not affect the validity of the ALJ’s legal findings and should be denied.

**E. Exception (#1) to the ALJ’s legal conclusion that Zingales’ testimony about his bargaining strategy was a pretext for discrimination**

After concluding that the excuse that Respondent could not unilaterally give Appreciation Day to employees covered by a collective bargaining agreement was a pretext [ALJD 13-15], the ALJ carefully analyzed Respondent’s defense that the decision to exclude was predicated on a bargaining strategy held by Zingales. [ALJD 15-16] While not specifically labeling the bargaining strategy defense as a pretext, as Respondent in its exception would want to do, the ALJ analyzed the body of testimony given by Zingales and Geller and concluded that any bargaining strategy held by Zingales was not the reason for Merck’s decision to exclude. The testimony of

Geller and Zingales, which is summarized below, fully justifies the findings of the ALJ in this regard.

Geller gave key testimony regarding why Merck supposedly made its decision to exclude. According to Geller, he consulted with Zingales three to five times-- and only with Zingales-- as to the impact labor laws had on whether employees in the United States could receive Appreciation Day. [160/16-20; 156/15] According to Geller, Zingales gave only the basic legal advice that Merck could not unilaterally provide the benefit to employees covered by a collective bargaining agreement. [147/22-24, 153/19-154/1] Specifically, Geller did not testify that Zingales stated to him anything whatsoever about a bargaining strategy or how it might apply to the considerations involving the planning for Appreciation Day. Geller also did not testify that Zingales explained the possibility that Appreciation Day could lawfully be offered to the unions. Moreover, Geller offered absolutely no reason why Appreciation Day was not offered to the unionized employees through contact with their representatives. Thus, the testimony of Geller does nothing to support Respondent's exception.

Zingales' testimony followed that of Geller. Zingales confirmed that he told Geller that unilaterally granting Appreciation day where contracts were in effect would violate the law.<sup>7</sup> On direct examination, Zingales did not state that he advised Geller to take the action to exclude the employees covered by a collective bargaining agreement, except those at the Kenilworth Plant, from receiving Appreciation Day. However, on cross examination he belatedly claimed that he gave Geller that advice, asserting that this advice was consistent with a bargaining strategy he supposedly held. [195/11-17]

Regarding this purported bargaining strategy, Zingales testified, with little detail, that he adhered to a bargaining strategy that dealt with specific local issues and which did not include giving additional benefits to unionized employees during the term of a contract. [177/22-178/13] However, as expounded upon in Part III, E, above, Zingales admitted he had not discussed his

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<sup>7</sup> Zingales correctly pointed out to Geller that the terms of the collective bargaining agreement in effect at the Kenilworth Plant required Merck to give Appreciation Day to the represented employees there. [174/8]

views on bargaining strategy with Geller or anyone else in management! [178/14-17] Zingales never explained why his undisclosed bargaining strategy had to be applied in the unique situation where Merck sought to show appreciation to all of its employees through granting a day off with pay.

The ALJ correctly concluded that Zingales' very limited testimony regarding the decision making process that occurred is entirely inadequate to allow Respondent to carry its *Wright Line* burden. Evaluating the testimony of Zingales and Geller, the ALJ was fully justified in concluding that any bargaining strategy Zingales might have held had no real effect upon Merck's decision to exclude. The ALJ correctly noted that Respondent's bargaining strategy defense is nothing more than a transparent, but failed, attempt to invoke the right of an employer under Board law to treat represented and unrepresented employees differently if part of a bargaining strategy.<sup>8</sup> [ALJD 16/12-15] Thus, the proffered reason for Merck's decision to exclude could properly be called a pretext.

For all the foregoing reasons and the careful legal analysis of the ALJ, Respondent's exception to the ALJ's conclusions regarding a pretext should be denied.

**F. Exception (#2) to the ALJ's (purported) legal conclusion that an employer bargaining strategy not to negotiate mid-term collective bargaining improvements, which takes account of union bargaining strategy not to entertain mid-term contract concessions is evidence of "retaliation"**

This exception utterly and conveniently avoids any recognition of the basis upon which the ALJ found an 8(a)(3) violation through Merck's decision to exclude. By describing Merck's conduct as one that "takes account of union bargaining strategy", Respondent chooses to ignore the factual findings of the ALJ. In its brief in support of exceptions Respondent takes great pains and 21 pages of verbiage to veil the clear testimony of its own witness and the only reasonable legal conclusion based on that testimony.

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<sup>8</sup> "The Board has long held that employers may offer different benefits to represented and unrepresented groups of employees as part of a *bargaining strategy*." *Sun Transport, Inc.*, 340 NLRB 70, 72 (2003), citing *Shell Oil Co.*, 77 NLRB 1306 (1948) (emphasis added)

The ALJ did not state that any employer's bargaining strategy not to negotiate mid-term changes which takes into account a union's like bargaining strategy is evidence of an unlawful motive of retaliation. The ALJ never generalized in this manner. Rather, the ALJ's finding was based on Killen's testimony in which he revealed to Local 10-580 officials Respondent's actual motivation to exclude unionized employees in the United States from being shown the same appreciation Merck planned to show to all other employees worldwide. Killen testified as to what he told Vallo (as amplified by the Counsel for the General Counsel's bracketed comments):

"And he [Vallo] asked 'Why?' [Merck has decided to exclude] And I articulated the reasons that I was given [by Zingales at a meeting held the day before with plant managers who were seeking an explanation for Merck's decision] which were linked to payroll administration changes, 401K administration changes and year end holidays. That's what I had taken from the discussion [with Zingales]; again, changes that happened with the non-unionized employees [changes made by Merck] but the union wouldn't discuss it in the previous period of time outside of negotiations [lawful union conduct pursuant to Section 8(d) of the Act]." [245/17-23]

The ALJ analyzed what he deemed to be Respondent's argument for a lawful "tit for tat" bargaining strategy. [ALJD 17/17-18/2] The ALJ concluded, based on Killen's explanation to Vallo and Little, that the "tit" of excluding unionized employees in the United States from receiving Appreciation Day, is certainly not excused by the unions' lawful "tat" of declining to discuss mid-term changes in payroll administration, 401K administration and year end holidays. He correctly rejected that sort of argument as "specious". [ALJD 17/19]

With regard to Killen's revelation, it must be clearly recognized that Killen did not merely place the unions' lawful conduct in the context of a purportedly lawful action by Merck. He did not refer to the unions' lawful past conduct as an instructive example of how Merck could lawfully make an unrelated decision concerning Appreciation Day. Nor did Killen explicitly state, or imply in any manner, that an exercise of Section 8(d) rights was driving Merck's decision to exclude. None of these benign explanations, if indeed true, was communicated by Killen. Rather, Killen starkly revealed exactly what he had learned from Zingales at their

meeting—the frank revelation that Merck was retaliating against the unions simply because of their past lawful conduct, which conduct Merck found to be highly offensive.

Respondent can try to avoid the legitimacy of the ALJ's finding of an 8(a)(3) violation by asserting in this exception something the ALJ never stated or concluded, but to no avail for the aforesaid reasons. Accordingly, the Board should deny this exception.

**G. Exception (#3) to the ALJ's (purported) legal conclusion that Merck violated Section 8(a)(3) by refusing to give Appreciation Day to employees covered by collective bargaining agreements where there is no record evidence of anti-union animus or a purpose to "encourage or discourage membership in any labor organization"**

This exception flies in the face of the record testimony of Respondent's own witness and Board law as to the meaning of discrimination that might encourage or discourage membership in a union. Having expounded upon the basis for the ALJ's finding (the testimony of Killen-- Part IV, F of this brief), this exception requires little comment. Killen revealed to the Local 10-580 officials that anti-union animus was Merck's motivation when he explained why Merck had made its decision to exclude. It almost goes without saying that when an employer is motivated to retaliate based on the lawful conduct of a union, anti-union animus is a fitting description and legal conclusion. Any time an employer takes an action to retaliate for any union's lawful conduct there is a logical inference that such action might discourage membership in that union.

This exception has no validity based on the record testimony and Board law regarding the anti-union basis for finding a violation. Accordingly, it should be denied.

**H. Exception (#4) to the ALJ's legal conclusion that Section 8(d) of the Act does not permit an employer to refuse to "discuss or agree to any modification of the terms and conditions contained in a contract for a fixed term" as part of an overall bargaining strategy**

This exception is one more effort by Respondent to confuse the lawful exercise of the rights given under Section 8(d) with unlawful conduct in the instant cases under Section 8(a)(3) where Merck withheld offering a benefit from represented employees when that same benefit was being given to unrepresented employees. Once again, Respondent tries to use a

purported bargaining strategy to transform 8(d) rights into immunity from conduct in violation of 8(a)(3).<sup>9</sup> A brief summary of Board law regarding the failure to offer a benefit to represented employees that is given to unrepresented employees is a good starting point for showing how Respondent's exception does nothing to invalidate the ALJ's finding of a violation.

Under *Shell Oil Co.*, 77 NLRB 1306, 1310 (1948), an employer is privileged to grant benefits to its unrepresented employees without providing the same benefits to its represented employees, so long as it does not have an unlawful motive. However, where an employer's disparate treatment of represented and unrepresented employees is motivated by anti-union animus, it is unlawful discrimination that violates Section 8(a)(3) and the *Shell Oil Co.* privilege does not apply. *Id.* at 1310 Moreover, as noted above, "The Board has long held that employers may offer different benefits to represented and unrepresented groups of employees as part of a bargaining strategy." *Sun Transport, Inc.*, 340 NLRB 70, 72 (2003)

In the context of bargaining for a collective bargaining agreement, the Board recently found a violation of Section 8(a)(3) when an employer withheld a wage increase for its represented employees while giving a wage increase to non-bargaining unit personnel. *Arc Bridges, Inc. (Arc Bridges II)*, 362 NLRB No. 56, slip op. at 2-3 (Mar. 31, 2015) The Board rejected the employer's argument that its actions were part of a bargaining strategy and concluded that the real reason for the disparate treatment was in reaction to the represented employees selecting the union as their bargaining agent.<sup>10</sup>

The aforesaid cases were decided in the context of contract negotiations.<sup>11</sup> However, the contractual status of the parties is not determinative of whether an employer has committed a violation when it has treated unrepresented and represented employee disparately. In *Phelps Dodge Mining Co.*, 308 NLRB 985 (1992), enf. denied 22 F.3d 1493 (10<sup>th</sup> Cir. 1994), the

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<sup>9</sup> The unconvincing testimony of Zingales and Geller on the subject of a bargaining strategy is discussed in detail in Part III, E of this brief.

<sup>10</sup> The ALJ appropriately relied upon the Board's reasoning in *Arc Bridges, Inc. (Arc Bridges II)*, in part, for his legal conclusions. [ALJD 13/34-14/8]

<sup>11</sup> See, e.g., *South Shore Hospital*, 245 NLRB 848, 860-61 (1979), enforced, 630 F.2d 40 (1<sup>st</sup> Cir. 1980) (involving the issue of a wage increase denied to unionized employees).

Board found a Section 8(a)(3) violation where the employer failed to give the same quarterly bonuses to represented employees that it gave to unrepresented employees during the term of a collective-bargaining agreement when there were no ongoing negotiations. *The B.F. Goodrich Co.*, 195 NLRB 914 (1972) is an older case where contract negotiations were not going on when the benefit was disparately given.<sup>12</sup> In a recent case, *KAG-West, LLC*, 362 NLRB No. 121, slip op. at 2 (June 16, 2015), the Board found a violation of Section 8(a)(3) when the employer therein gave a wage increase to unrepresented employees, but denied the increase to newly represented employees because the employer was motivated by its opposition to the successful organizing effort. Bargaining for a first contract had not as yet commenced when the unlawful conduct occurred.

Regardless of the context, when allegations of unlawful disparate treatment involving the giving of benefits are analyzed, the motivation of the employer is determinative. In determining whether disparate treatment is unlawfully motivated, the Board applies the test set forth in *Wright Line*.<sup>13</sup>

In his Decision the ALJ never stated any hard and fast rule, as Respondent contends in this exception, that there cannot be an overall bargaining strategy that includes strict adherence to the practice of refusing to even entertain mid-term changes. Counsel for the General Counsel contends that the ALJ would certainly agree that Board law allows an employer in specific situations where its motivation is lawful to reject all discussion of proposed mid-term changes pursuant to Section 8(d). In fact, the ALJ cites cases for this proposition. Furthermore, Counsel for the General Counsel speculates that the ALJ might find no violation where an employer consistently, and absent a discriminatory motive, adhered to a “live-and-die by-the-

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<sup>12</sup> In *B. F. Goodrich*, the Board found no Section 8(a)(3) violation where the represented employees were denied a profit-sharing benefit given to unrepresented employees, during the term of a contract, because there was no evidence of discriminatory treatment. However the Board stated the following clear principle: “[h]ad the grant been accompanied by statements encouraging the employees to abandon collective representation in order to secure the benefit, . . . we would have clear evidence of unlawful 8(a)(3) motivation.” *Id.* at 915, fn. 4

<sup>13</sup> 251 NLRB 1083, 1089 (1980), *enfd. on other grounds*, 662 F.2d 899 (1st Cir. 1981). See also *KAG-West, LLC*, supra, at 2 and *Arc Bridges II*, supra at 2-3.

contract strategy.”<sup>14</sup> However, the ALJ concluded that none of these scenarios was at work here. Rather, he found that the evidence proved that Merck’s decision to exclude was in retaliation for the unions’ prior exercise of their rights under the Act. It is this motivation that makes Merck’s conduct unlawful and the ALJ so found.

Respondent vainly argues over three pages in its brief in support of exceptions that the ALJ incorrectly relied upon *R.E.C. Corp.*, 296 NLRB 1293 (1989) to justify his legal conclusions. [RB20-23] Counsel for the General Counsel contends that the ALJ’s citation to *R.E.C. Corp.* was simply an apropos reference to an analogous circumstance. [ALJD 11/18] It was *Sun Transport*, and numerous other Board decisions, that the ALJ relied upon. [ALJD 10/47-13/2] The ALJ correctly applied the well-established *Wright Line* standard to the record evidence.

Respondent repeatedly asserts in its brief in support of exceptions, that the ALJ decided these cases based on a personal desire that represented employees of the Charging Parties ought to have been given Appreciation Day. Such assertions impugn the ALJ’s integrity, but, much more importantly, they ignore the ALJ’s careful evaluation of all witness testimony, the clear meaning of Killen’s explanation for Merck’s decision to exclude, and other related evidence including the prior history of giving days off with pay and Merck’s dealings with labor organizations outside the United States.

Counsel for the General Counsel submits that the purported “bargaining strategy” argument is nothing more than a red herring in these proceedings. Even if Zingales held to a bargaining strategy of negotiating contracts separately with the various unions; even if he generally opposed giving a benefit that did not derive from contract negotiations; yea, even if he cherished Section 8(d) rights; none of those assumptions begin to explain why Merck stubbornly refused to offer Appreciation Day to one small group within its tens of thousands of employees. For the sake of learning the truth behind Merck’s decision to exclude we are indebted to the revelation given by Killen to the Local 10-580 officials. The motive was unlawful retaliation pure

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<sup>14</sup> This is a term used by the ALJ in his decision. [ALJD 16/7-8] His analysis of the evidence in light of this type of bargaining strategy is highly instructive. [ALJD 16/4-15]

and simple because it was in reaction to the unions' lawful exercise of their Section 8(d) rights. This, in a nutshell, is what the ALJ correctly found.

For all the foregoing reasons and the ALJ's analysis that is supported by Board law, this exception should be denied.

**I. Exception (#5) to the ALJ's legal conclusion involving Killen's statement to Local 10-580 officials**

Killen testified that he told Vallo and Little the reason for Merck's decision to exclude was the unions' previous refusal to discuss certain mid-contract changes that Merck wanted to apply to unionized employee that it was applying to nonunion employees. The ALJ found that communicating this unlawful motive, which he learned from Zingales, violated Section 8(a)(1) of the Act because it reasonably tended to interfere with, threaten or coerce employees in the exercise of their Section 7 rights. Respondent's exception to this legal finding has no validity for the reasons ably articulated by the ALJ.

The cases cited in Respondent's brief are not on point, unlike those cases relied upon by the ALJ. Specifically, the ALJ cited *Alamo Rent-A-Car*, 362 NLRB No. 135 (June 26, 2015). The relevant portion of that decision read, in part, as follows: "the Respondent's managers told unit employees that they were losing the benefit 'because of their union contract', but also because they confirmed that nonunion employees would retain the benefit in a different form. Under these circumstances, unit employees would reasonably believe they were being targeted due to their union representation." *Id.* at slip op. 2, fn.3

The facts in *Alamo Rent-A-Car* are very similar to those in the cases at hand. In both situations, unit employees were told they would not receive a benefit because their union had engaged in protected activity. In *Alamo Rent-A-Car*, the protected activity was having bargained for a collective bargaining agreement. In the instant cases the protected activity was the unions having exercised their right under Section 8(d) of the Act to refuse to discuss mid-contract changes. Moreover, in *Alamo Rent-A-Car*, the employer made clear to its employees that nonunion employees would receive a similar benefit. Similarly, in the instant cases, the

awareness of the unionized employees that they were being treated differently than those employees not covered by a collective bargaining agreement is central to the 8(a)(1) violation the ALJ found.

Respondent states in its exception that Killen was “speaking to an experienced union official in response to the official’s questions about why the Company was not agreeing to bargain over the September 4 holiday.” Respondent seems to be arguing for an excuse to Killen’s conduct based upon to whom he spoke. However, the fact that Vallo was the President of Local 10-580 makes Killen’s statement even more coercive than if it was made some a rank and file member. This is so because in his position as President, it would be he who Merck would approach in the future about proposed mid-contract changes and not any individual unit employee. Vallo had heard firsthand from Killen how Merck was willing to retaliate for an uncooperative response to a proposal.

For all the foregoing reasons and the careful legal analysis of the ALJ, Respondent’s exception to the finding of an 8(a)(1) violation through Killen’s statement to Vallo and Little should be denied.

#### **J. Exception (#6) to the ALJ’s legal conclusion regarding the ordered remedy**

Respondent excepts to the remedy set forth in the ALJ’s Decision that requires Merck to make whole all employees who were denied Appreciation Day. This exception has several facets, all of which are groundless. First, Respondent asserts that the remedy should not flow to every employee who did not get September 4 off with pay. Presumably, this argument tacitly admits that the make whole remedy should only inure to those employees represented by the three Charging Parties in the cases herein to the exclusion of those employees represented by other unions within the United States.<sup>15</sup> In this regard, the Board is tasked by the Act to provide a remedy for all covered employees who are victimized by a violation irrespective of whether

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<sup>15</sup> As previously noted, there is no dispute that the Merck employees represented by the International Association of Machinists at its Kenilworth facility did receive September 4 off with pay pursuant to the collective bargaining agreement in effect there. [ALJD 3/fn. 1] Thus, obviously the remedy ordered by the ALJ would not run to these employees.

they filed, or were named, in a charge. This principle is shown in many ways regarding various violations of the Act. One obvious example, is where a notice posting is required to remedy a coercive rule at all facilities of an employer and not only the facility where the charge was filed.

A second argument is that the remedy supposedly covers union-represented employees of Merck outside the United States. The ALJ's ordered remedy obviously does not encompass employees in foreign countries because the ALJ stated that the losses had to be suffered "as a result of [Merck's] discriminatory denial to them of the paid day off known as appreciation day." The announcement of Appreciation Day and Merck's decision to exclude only affected employees in the United States. Therefore, the ALJ clearly did not intend that any employees outside the United States were covered by his make whole remedy.

Lastly, the ALJ's remedy is argued to be improper because it goes beyond merely ordering Merck to bargain with the Charging Parties over the paid day off. It is impossible to imagine how bargaining over something that has irreversibly occurred could have any remedial effect. By filing this exception, Respondent once again tries to make rights set forth in Section 8(d) the focus of its conduct. The violation the ALJ found, however, was an 8(a)(3) violation and it is axiomatic that a make whole remedy is required when employees are the victim of 8(a)(3) based conduct. Any other result is clearly does not effectuate the purposes of the Act.

#### **IV. CONCLUSION**

Based on the above and record as a whole, Counsel for the General Counsel submits that the record herein, as set forth and argued above, fully supports the findings and conclusions and recommended remedy of the ALJ that Respondent has violated Sections 8(a)(3) of the Act, as alleged in the Consolidated Complaint, by unlawfully failing to give employees represented by the Charging Parties September 4, 2015, as a paid day off work, while granting its unrepresented employees the same benefit, and Section 8(a)(1) by its supervisor and agent, Brian Killen, unlawfully informing Respondent's employees that Merck's denial of a paid "Appreciation Day" was in retaliation for labor problems.

It is submitted that the findings of fact and conclusions of law of the ALJ are amply supported by the record evidence. Respondent's arguments in its Exceptions in no way justify a failure to affirm any of the ALJ's rulings, findings and conclusions as set forth in his Decision and Recommended Order inasmuch as the ALJ has carefully analyzed and applied appropriate precedent to the facts of this case. Accordingly, Counsel for the General Counsel respectfully requests that the Board deny all of Respondent's Exceptions and adopt the Decision and Recommended Order of the ALJ in its entirety.

Dated at Pittsburgh, Pennsylvania, this 31st day of March 2017.

Respectfully submitted,

/s/ David L. Shepley

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David L. Shepley  
Counsel for the General Counsel

NATIONAL LABOR RELATIONS BOARD  
Region Six  
1000 Liberty Avenue, Room 904  
Pittsburgh, Pennsylvania 15222